RECEIVED

FEB 1 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No.92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY OF GTE

GTE Service Corporation ("GTE"), on behalf of the GTE Domestic Telephone Operating Companies and GTE Laboratories Incorporated, hereby replies to the comments of others in the above-captioned proceeding.

GTE has multiple interests in this proceeding. One of its affiliated telephone operating companies, GTE California Incorporated, owns coaxial and optical fiber facilities which are leased to a cable operator, Apollo CableVision, in the City of Cerritos. GTE itself, by special permission, is involved on an experimental basis in the programming of some of these channels, notably the "near video on demand" offering known as CenterScreen.(SM)[1] In addition, as part of the Cerritos experiments, GTE has worked with GTE Labs on a video switch and other technologies associated with "video on demand" and has

No. of Copies rec'd 0+4
List A B C D E

[1] *General Telephone Company of California,* 4 FCC Rcd 5693 (1989), *remanded sub nom. National Cable Television Assn. v. FCC,* 914 F.2d 285 (1990), remand proceedings pending, File Nos. W-P-C-5927, 6250.

developed the proprietary set of interactive services marketed under the name Main Street.(TM)[2]

GTE is chiefly concerned that Section 19 of the captioned 1992 Cable Act, 47 U.S.C.§628, be implemented to achieve the results intended by Congress:

> [T]o address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.[3]

However, GTE is not indifferent to the importance of regulations faithfully expressing Congressional intent in the related Section 12 of the 1992 Act, 47 U.S.C.§616, and takes up that part of the statute more briefly below.

Both as a supplier of new services and as a transporter for competing multichannel video programming distributors, GTE expects effective remedies, under both Section 19 and Section 12, against cable industry coercion of new entrants, including forced grants of exclusivity and other unreasonable restraints on the ability of non-cable-affiliated vendors and distributors to compete.

---

[2] 1991 Report on Cerritos, Submitted to Domestic Services Branch, Federal Communications Commission, March 30, 1992, pages 13-15, Exhibits F,G,H. Main Street was introduced on a Continental Cablevision system in the Boston area in 1987 as a market trial and is now available as a commercial offering. It also has been offered commercially on the Daniels Cablevision system in the San Diego area since December, 1992.

[3] H.R.Rep.102-862, 102d Cong., 2d Sess., 93.

<u>Antitrust law on non-price vertical restraints cannot adequately reflect Congressional insistence on local program competition and diversity.</u>

In the course of attempting to justify higher program license fees to non-cable distributors, Viacom International states:

> Not surprisingly, because they controlled access to consumers, cable systems typically obtained low rates in return for carriage or their agreement to push subscriber growth. Notwithstanding the entry of new technologies, cable operators still control access to the overwhelming number of subscribers and use the bargaining power this creates to obtain low license fees from program services.

Even where the cable operator is not the sole distributor, Viacom adds in a footnote, cable's typically overwhelming advantage in subscriber base means "the programmer <u>must</u> sell its programming to the cable operator in order to be a viable entity." (Comments, 56-57, emphasis in original)

Despite this frank acknowledgment of the cable operator's power in its local market, Viacom elsewhere argues for liberal allowance, under Section 628, of exclusive distribution agreements between cable operators and new program services. (Comments, 36-37) It suggests that programmers cannot be forced into such exclusivity by cable operators because Section 616 forbids coercion.

If cable operators possess the power asserted by Viacom, they need not actively coerce in order to take advantage of exclusivity or other non-price restraints. They need only passively refuse to carry the new service. With local market dominance extending regionally and nationally through multiple system operators (MSOs), refusal alone will gain cable's ends.

Thus Section 616 is likely to be unenforceable, short of prolonged litigation, unless Section 628 is read to put the burden on the cable operator to justify exclusive contracts in its serving area [Section 628(c)(2)(D)] and, outside that area, to justify not only exclusivity but also other "practices, understandings, arrangements, and activities" that prevent competitors' access to particular programming.

GTE agrees with Liberty Cable (Comments, 14-18) that exclusive agreements should be declared presumptively illegal, this threshold barrier to be overcome only as provided by Section 628(c)(4)'s weighing of public interest factors.[4] Use of an initial presumption would accord with BellSouth's view (Comments, 7-10) that the statute requires advance Commission approval for all exclusive agreements except those grandfathered by Section 628(h).

NCTA concedes that exclusive contracts are "per se unfair" if operative outside the cable serving area, and unlawful if they inflict competitive injury. (Comments, 40)[5] Within the service area, however, NCTA relies upon selective readings from economics and antitrust law to suggest, in effect, that exclusive contracts be presumed lawful because "most exclusive contracts promote rather than diminish competition and consumer welfare . . ." (Comments, 44)

If the video programming distribution market were more like the competitive manufacturing distribution market described in the Supreme Court cases relied on by NCTA, the argument might be more persuasive.[6] In fact, however, Congress discerned little or no effective competition in multichannel

---

[4] The public interest rebuttal is limited to exclusivity within the cable operator's serving area. Exclusivity and other exclusionary practices reaching beyond that area are only saved from prohibition if they do not operate to prevent a multichannel competitor from obtaining the particular programming at issue.

[5] GTE believes that the presumption of illegality should include a presumption of injury. In this regard, NCTA characterizes competitive injury in the generality: Has the conduct "prevented or significantly hindered the ability of any distributor to provide programming to subscribers." *Id.* But the programming at issue is not just any programming; it is the particular programming to which access is precluded or significantly hindered.

[6] Moreover, had Congress intended to rely solely or even largely on antitrust law and practice, it need not have legislated the specific prohibitions in the 1992 Act. Instead, general antitrust protections were meant to add to, rather than subtract from, the particular safeguards in the legislation. *See,* Section 27.

video distribution. Legislators were concerned to revive and encourage "intrabrand" as well as "interbrand" competition. They recognized that denial of access to the most popular programming would suppress the former, even if other offerings were accessible in aid of the latter:

> The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market.[7]

For all these reasons, the Commission should look first to the express language of the statute and to the clearest statements of the legislative history. Once these have been followed in the creation of effective competition in multichannel video distribution, antitrust principles should help to preserve the contests of the new marketplace.

<u>Section 628 prohibits unfair conduct between cable operators and satellite cable or broadcast programming vendors, integrated or non-integrated.</u>

NCTA (Comments, 11-12) and others contend that Section 628 cannot "reasonably be construed to restrict relationships between cable operators and <u>non</u>-vertically integrated programmers." GTE disagrees.

As NCTA observes, Section 628(b) reads disjunctively on "cable operator" and therefore covers "certain unilateral, unfair conduct by a cable operator" that has the effect of significantly hindering or preventing a multichannel competitor from providing satellite cable or broadcast programming. But there is nothing in subsections (b) and (c), read together, which immunizes bilateral unfairness, in

---

[7] S.Rep.92-102, 102d Cong., 1st Sess., 28.

league with a satellite vendor, just because the vendor and the cable operator are not vertically integrated.

Instead, by its literal terms, subsection (c)(2) merely specifies the "minimum contents of regulations" to carry out subsection (b). That is, the ceiling of applicability of (b) is higher than the floor in (c)(2). Subsection (b) names both the "cable operator" and the "satellite broadcast programming vendor" without qualification. Of the three types of distributors mentioned in the statute, only the satellite cable programming vendor is qualified by the phrase "in which a cable operator has an attributable interest."

If, under the ceiling of subsection (b), a cable operator or a satellite broadcast programming vendor can violate the law through unilateral unfairness, the operator or vendor may also contravene the statute through unfair relationships with non-integrated programmers. In terms of the real-world marketplace described by Viacom International above, this makes perfect sense. Programmers of all sorts, integrated and non-integrated, depend for their viability on cable carriage. Even non-integrated programmers may succumb to unfair favoritism toward cable, resulting in significant hindrance to or denial of program access to cable's multichannel competitors.

<u>Discriminatory agreements post-dating June 1, 1990
should be reformed on the basis of complaint.</u>

The Commission is correct to be concerned (Notice, ¶27) that its tentative decision not to apply the anti-discrimination requirements of Section 628 retroactively to existing contracts

> may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements.

This concern is reinforced by the reality that the prohibition on cable service area exclusivity sunsets in 10 years absent a final-year FCC rulemaking justifying its continuation. Section 628(c)(5).

GTE agrees with DirecTv (Comments, 25-26) that existing satellite cable programming contracts not expressly grandfathered -- that is, those operative outside cable service areas and those entered into after June 1, 1990 -- can and should be brought into compliance, on the basis of complaint, within a reasonable period. The compliance grace period might vary according to the equities of particular situations.

Congress chose the June 1990 date with a purpose. It determined that parties considering new or renewed exclusive distribution agreements or engaging in other exclusionary practices were on sufficient notice of legislative activity in the area to remove or diminish the "reliance interests" that might otherwise inhere in such contracts. Given notice, the parties could have bargained contingently with respect to various legislative outcomes.[8]

This is not a case to disfavor retroactive application for agreements post-dating June 1, 1990, because Congress could have grandfathered these along with the pre-June 1990 contracts affecting cable service areas. That the legislators did not do so strongly suggests they either did not wish this result or were willing to leave the question of reformation to the FCC. In addition, Congress' decision not to grandfather agreements affecting non-cable service areas implies that egregiously discriminatory service area contracts should also be brought into compliance.

---

[8] In early 1990, the Senate held two hearings on S.1880, the predecessor to S.12, and the measure was reported by the Committe on Commerce, Science and Transportation in June of 1990. S.Rep.102-92, 102d Cong., 1st Sess., 3,7.

<u>For purposes of Section 628(c)(2)(C), "areas not served by a cable operator" should be read to include unbuilt portions of cable franchises.</u>

Legislative conferees explained that an area "served" by a cable operator for purposes of Section 628 was one "actually passed by a cable system and which can be connected for a standard connection fee." NCTA (Comments, 41) proposes that this be interpreted to exclude only those households that "cannot subscribe" to the operator's service.

Such a reading fails to take account of a segment of the households Congress had in mind: Those that are passed and can be served, but for a higher-than-standard connection fee. A strict reading of the legislative history would suggest that such households are "not served" within the meaning of Section 628.

Reading the statutory language in light of the legislative history reference to "actually passed," GTE believes that unbuilt portions of areas franchised for cable service must be considered "not served" for purposes of Section 628. Such a reading is not only accurate but also reinforces useful policy goals:

• By providing the slow-building operator an additional incentive to complete his franchise's construction and gain the benefits of Section 628(c)(2)(D) treatment;[9]

• By providing overbuilders or other multichannel competitors an incentive to serve an unserved area without the hindrance of an exclusive video distribution agreement, since the 1992 Act forbids such contracts in areas not cable-served.

---

[9] In a given complaint about an exclusive distribution agreement, the cable operator's area would be "frozen" to its homes-passed status as of the date of the complaint. But the operator would retain the incentive to enlarge his served area for purposes of any future exclusivity arrangements, which would then be judged under the public-interest test of Section 628(c)(4).

CONCLUSION

For the reasons discussed above, the Commission should rely primarily on the express statutory language of Sections 19 and 12 of the 1992 Cable Act, and only secondarily on antitrust law principles and precedents. The agency should find that Section 19 prohibits unfair conduct between cable operators and satellite programming vendors, even when the vendor is not integrated with the cable operator. Finally, the rules to be adopted here should allow for reform of certain existing exclusive distribution agreements, and should specify that unbuilt portions of cable franchises are "not served" within the meaning of Section 19.

Respectfully submitted,

GTE SERVICE CORPORATION

By ____________________

Ward W. Wueste, Jr., HQE03J43
Marceil F. Morrell, HQE03J35
P.O. Box 152092
Irving, Texas 75015-2092
(214) 718-6362

James R. Hobson
Jeffrey O. Moreno
Donelan Cleary Wood & Maser, P.C.
1275 K Street N.W., Suite 850
Washington, D.C. 20005-4078
(202) 371-9500

February 16, 1993

ITS ATTORNEYS

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply of GTE" have been mailed by first class United States mail, postage prepaid, on this 16th day of February, 1993 to all parties of record.

Ann D. Berkowitz